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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Kenderick Begay,

No. CV-12-08237-PCT-DGC

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Petitioner,

ORDER

11

v.

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USA,

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Respondent.

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15 The government has filed a motion for reconsideration (Doc. 95) of the Court's
16 order granting Petitioner Kenderick Begay's motion to vacate brought pursuant to 28
17 U.S.C. § 2255 (Doc. 91). The Court will deny the motion.¹

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I. Legal Standard.

19 Motions for reconsideration are disfavored and should be granted only in rare
20 circumstances. *Collins v. D.R. Horton, Inc.*, 252 F. Supp. 2d 936, 938 (D. Ariz. 2003). A
21 motion for reconsideration will be denied "absent a showing of manifest error or a
22 showing of new facts or legal authority that could not have been brought to [the Court's]
23 attention earlier with reasonable diligence." LR Civ 7.2(g)(1); *see Carroll v. Nakatani*,
24 342 F.3d 934, 945 (9th Cir. 2003). Mere disagreement with an order is an insufficient
25 basis for reconsideration. *See Ross v. Arpaio*, No. CV-05-4177-PHX-MHM, 2008 WL

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¹ As the Court noted in its text order dated April 25, 2015 (Doc. 96), many of the arguments raised by the government were not raised in its objections to the Report and Recommendation ("R&R"). Doc. 84. Although the Court could choose to deny those arguments for that reason alone, it recognizes the importance of a new trial order and will address all issues raised by the government.

1 1776502, at *2 (D. Ariz. 2008). Nor should reconsideration be used to ask the Court to
 2 rethink its analysis. *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz.
 3 1998); *see N.W. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-26 (9th
 4 Cir. 1988).

5 **II. Analysis.**

6 The government argues the Court should grant its motion for three reasons: (1) the
 7 Court committed manifest error in concluding that Begay's trial counsel had an
 8 obligation to interview Dorasita Begay and Alfred Bennie Lee, Jr., (2) the Court
 9 committed manifest error by concluding that Lee's confession would have been
 10 admissible, and (3) the Court erred in finding that trial counsel was ineffective for failing
 11 to introduce the pawn shop records.

12 **A. Trial Counsel's Performance.**

13 The government first argues that the Court should not have concluded that trial
 14 counsel had an obligation to interview Dorasita and Lee because both witnesses had
 15 already been interviewed and trial counsel "had familiarized himself with the content of
 16 those interviews." Doc. 95 at 4. In support of its position, the government relies on four
 17 Ninth Circuit cases, none of which were cited in its objections to the R&R. Doc. 84.
 18 Regardless, the Court finds the government's argument meritless.²

19 In *Bragg v. Galaza*, 242 F.3d 1082, 1086 (9th Cir. 2001), the defendant was
 20 convicted of second degree murder of a woman who was shot in her car in what appeared

21 ² The government claims it did not raise this argument in its objections because the
 22 R&R did not address the issue and the Court went beyond the scope of the R&R in its
 23 order. Doc. 100 at 2. It asserts "[t]here was simply no reason for [it] to analyze *Wiggins*,
 24 *Smith* [sic], or the scope of the duty to investigate." *Id.* at 2-3. But the R&R specifically
 25 addressed Begay's claim that "trial counsel rendered ineffective assistance by failing to
 26 investigate an alternate shooter . . . theory of defense." Doc. 77 at 7 (emphasis added).
 27 In fact, both of Begay's claims of error alleged a failure to investigate. *Id.* at 14. The
 28 R&R set out a detailed account of counsel's investigation followed by relevant case law
 from the Ninth Circuit. *Id.* It specifically cited *Avila v. Galaza* for the proposition that a
 "lawyer who fails to adequately investigate, and to introduce into evidence, [evidence]
 that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to
 that question to undermine confidence in the verdict, renders deficient performance." *Id.*
 (quoting 297 F.3d 911, 919 (9th Cir. 2002)). The R&R found that trial counsel's tactical
 decisions fell below the objective standard of reasonableness *because* he failed to
 investigate.

1 to be a drive-by shooting. Witnesses at trial testified that the defendant had been driving
2 with another passenger, Norwood, who was represented by the defendant's counsel in an
3 unrelated case. *Id.* at 1085. Norwood told counsel's investigator that he knew "all
4 about" the defendant's case, but the investigator did not further question him, and counsel
5 eventually withdrew from representing Norwood in the unrelated case. *Id.* at 1086. In
6 finding that counsel had no duty to further question his investigator regarding Norwood's
7 statement, the court noted that the defendant failed to "identify any information that
8 [counsel] had not already gained from other witnesses that he would have gained from
9 interviewing Norwood" and that "[t]here [was] no evidence that investigating Norwood
10 would be akin to investigating 'the most important defense.'" *Id.* at 1088. The court also
11 noted that the case against the defendant was "strong," given that "the passenger in the
12 victim's car identified [the defendant] as the driver; other witnesses identified [the
13 defendant's] car, [the defendant] or both[.]" *Id.* Moreover, the record was not fully
14 developed, as the court was without evidence of counsel's investigation and the reasons
15 he chose not to investigate. *Id.*

16 In *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998), the defendant argued that
17 his counsel was ineffective for "failing to interview and examine all of the witnesses at
18 trial." *Id.* at 1274. The Ninth Circuit disagreed, finding that "[p]rior to the time that trial
19 counsel was appointed to represent [the defendant], all of the eighteen witnesses had been
20 interviewed[,] [t]rial counsel [had] reviewed the transcripts of these interviews[,]" trial
21 counsel had reviewed the investigator's reports, and trial counsel had personally
22 interviewed the only eyewitness in the case. *Id.* The court further noted that "[t]rial
23 counsel put in the equivalent of twenty-seven eight-hour days in trial preparation" and
24 "that trial counsel did not personally interview each witness does not constitute
25 ineffective assistance." *Id.*

26 In *Eggleson v. United States*, 798 F.2d 374 (9th Cir. 1986), a defendant who pled
27 guilty to fraud argued that counsel "failed to interview governmental witnesses, to obtain
28 discovery materials and information from the government, and to subpoena defense

1 witnesses.” *Id.* at 376. The court rejected the claim, finding that “[t]he record clearly
 2 shows [counsel] was well informed of the facts and circumstances of the case by his
 3 discovery methods.” *Id.* Counsel had the “defendant as a source of information, . . .
 4 complete access to all of the witness interviews and statements taken by the government,
 5 as well as supporting documents and FBI reports.” *Id.* The court also noted that the
 6 defendant failed to identify what additional information would have been gained from
 7 further investigation. *Id.* The court found that counsel’s advice that the defendant plead
 8 guilty was reasonable trial strategy considering the strength of the government’s case. *Id.*

9 In *United States v. Naghani*, 252 F. App’x 185 (9th Cir. 2007) (unpublished), a
 10 defendant convicted of interfering with flight crew members argued that his counsel
 11 rendered ineffective assistance for failing to interview a flight attendant “to whom [the
 12 defendant] made a threatening remark that served as the basis for his conviction.” *Id.* at
 13 187. The court rejected the claim, finding that counsel “reviewed the written statements
 14 of [the flight attendant] as well as the investigator reports of interviews with [the flight
 15 attendant],” and that the defendant failed to “allege that an interview . . . would have
 16 revealed any new material facts.” *Id.*

17 These cases are distinguishable. None dealt with counsel’s failure to investigate
 18 the defendant’s “most important defense,” a key distinction recognized by the court in
 19 *Bragg*. See 242 F.3d at 1088 (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir.
 20 1994)). Here, trial counsel conducted almost no investigation into Lee’s alleged
 21 confession even though he recognized that “the heart of our case” was demonstrating Lee
 22 was in fact responsible for the murders. He did not recall speaking with the previously-
 23 hired investigator, Reuben Martinez, who interviewed Dorasita, or even attempting to
 24 obtain the investigator’s reports. Doc. 91 at 11. Even though the court appointed another
 25 investigator to assist trial counsel, neither the new investigator nor trial counsel
 26 interviewed any witnesses, let alone the witness most important to Begay’s defense: the
 27 man who allegedly confessed to the very crime with which Begay was charged. *Id.* at 11.
 28 Instead, trial counsel’s strategy was to simply try to “grab folks” outside of the courtroom

1 at another trial. *Id.*³

2 Unlike the cases cited by the government, this is not a situation where the witness
 3 accounts were “otherwise fairly known to defense counsel.” *Eggleston*, 798 F.2d at 376.
 4 In *Eggleston*, counsel “was well informed of the facts and circumstances of the case by
 5 his discovery methods.” *Id.* Here, however, the record is devoid of evidence that trial
 6 counsel took any steps to investigate Lee’s confession. Doc. 71-1 at 20, 52. Counsel in
 7 *LaGrand* at least reviewed both the interview transcripts and investigator reports of the
 8 eighteen witnesses, and counsel in *Naghani* reviewed both the statement report and the
 9 investigator report of the witness. This is not a case where counsel simply failed to re-
 10 interview a witness or dig a little deeper. Trial counsel deemed it unnecessary to
 11 interview any potential witnesses or to even phone investigator Martinez in an attempt to
 12 obtain the reports of Dorasita’s account of Lee’s confession. None of the cases cited by
 13 the government undermine the Court’s conclusion that trial counsel failed to conduct a
 14 reasonable investigation into Begay’s most important defense.

15 **B. *Strickland* Prejudice.**

16 The government argues that the Court erred in finding that Lee’s confession would
 17 have been admissible at trial under Federal Rule of Evidence 613 or 804, and thus Begay
 18 did not satisfy the prejudice prong of *Strickland*.

19 In its order, the Court found that if “Lee was available to testify at trial, he could
 20 have been asked whether he committed the murders and made the confession to
 21 Dorasita.” Doc. 91 at 19. If he denied committing the murders and confessing, “he could
 22 have been asked about his confession to Dorasita under Federal Rule of Evidence
 23 613(a).” *Id.* “Dorasita could have been called to testify about the confession under
 24 Rule 613(b), assuming Lee Jr. was afforded an opportunity to explain or deny the
 25 statement.” *Id.* The Court also found that if Lee was unavailable due to (1) his failure to
 26 appear, (2) his lack of recollection in making the confession, or (3) his invocation of his
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28 ³ In fact, trial counsel does not claim he successfully interviewed any witnesses
 this way.

1 Fifth Amendment rights, “Dorasita’s testimony about the confession would likely be
 2 admissible as a statement against interest under Rule 804(b)(3).” *Id.* It also found that
 3 the corroborating circumstances required by Rule 804(b)(3)(B) “likely exist in this case”
 4 given the detail of Lee Jr.’s confession. *Id.*⁴

5 **1. Rule 613.**

6 The government argues that the defense could not have called Dorasita solely for
 7 impeachment purposes under Rule 613. It relies on *United States v. Gomez-Gallardo*,
 8 915 F.2d 553 (9th Cir. 1990), a case in which a witness confessed to conspiring with the
 9 defendant but recanted the confession before the defendant’s trial. Notwithstanding the
 10 recantation, the government called the witness at trial with full knowledge that he would
 11 deny the defendant’s involvement. *Id.* at 554. The government then called three
 12 witnesses to impeach the witness’s testimony. *Id.* The Ninth Circuit reversed the
 13 conviction, noting that “impeachment is not permitted where it is ‘employed as a guise
 14 for submitting to the jury substantive evidence that is otherwise unavailable.’” *Id.* at 555
 15 (quoting *United States v. Peterman*, 841 F.2d 1474, 1479 (10th Cir. 1988)).

16 In contrast, in *United States v. Buffalo*, 358 F.3d 519 (8th Cir. 2004), the defense
 17 called a witness who had allegedly confessed to the crime with which the defendant was
 18 charged, knowing that he would deny confessing. The district court prohibited the
 19 defendant from calling two impeachment witnesses to whom the witness allegedly had
 20 confessed. *Id.* at 521. In reversing the conviction, the Eighth Circuit noted that the “vast
 21 majority of cases on the issue of impeaching one’s own witness with a prior inconsistent
 22 statement speak to the government’s use of the statements to impeach its witnesses where
 23 the statements inculpate the defendant.” *Id.* at 525. In such a situation, the “statement’s
 24 likely prejudicial impact often substantially outweighs its probative value for
 25 impeachment purposes because the jury may ignore the judge’s limiting instructions and
 26 consider the impeachment testimony for substantive purposes.” *Id.* (quoting *United*

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 28 ⁴ Another scenario, albeit it highly unlikely, was that Lee could have been called
 by the defense, appeared at trial, and testified to committing the murders.

1 *States v. Ince*, 21 F.3d 576, 581 (4th Cir. 1994)) (internal quotations omitted). Indeed,
 2 “[t]hat risk is multiplied when the statement offered as impeachment testimony contains
 3 the defendant’s alleged admission of guilt.” *Id.* (quoting *Ince*, 21 F.3d at 581). But
 4 “[w]hen the defendant seeks to introduce a prior inconsistent statement for impeachment
 5 purposes, the dangers identified above are not implicated.” *Id.* In other words, “the
 6 prejudicial impact of the statement does not endanger the defendant’s liberty by risking a
 7 conviction based on out-of-court statements that are not subject to confrontation by way
 8 of cross-examination.” *Id.* The Eighth Circuit found that because the defendant met the
 9 foundational requirements of Rule 613(b) by confronting the witness with the
 10 inconsistent statements and affording him the opportunity to explain or deny them, the
 11 district court should have conducted a Rule 403 inquiry instead of flatly rejecting the
 12 extrinsic evidence. *Id.* at 524. The district court abused its discretion by failing to
 13 conduct a Rule 403 inquiry and failing to consider Rules 607 and 613(b). *Id.* at 527.

14 In light of the ruling in *Buffalo*, which the Court finds persuasive, the government
 15 does not identify any manifest error. In its earlier order, the Court concluded that the
 16 evidence would have been admissible under Rule 613(a) or (b). Doc. 91 at 19. The
 17 Court found that extrinsic evidence of the confession would have been admissible
 18 “assuming Lee Jr. was afforded an opportunity to explain or deny the statement.” *Id.*
 19 Thus, assuming Begay had laid the requisite foundation under the rule, the Court would
 20 have then considered Rule 607, which provides that “[a]ny party, including the party that
 21 called the witness, may attack the witness’s credibility.” Rather than flatly rejecting the
 22 evidence, the Court then would have conducted a Rule 403 inquiry to determine whether
 23 the probative value of the evidence was substantially outweighed by any unfair prejudice
 24 to the government. Because the government would have had a full opportunity to cross-
 25 examine Lee and Dorasita and to argue to the jury that Lee’s confession is unreliable, the
 26 risk of unfair prejudice would have been minimal and the Court likely would have
 27 overruled any Rule 403 objection.

28 The Court’s review of these cases has identified an issue not raised by the

1 government – Dorasita’s testimony would be admissible under Rule 613 only for the
 2 limited purpose of impeachment and not as substantive evidence that Lee committed the
 3 murders. *See United States v. Crouch*, 731 F.2d 621, 623 (9th Cir. 1984) (“Hearsay
 4 statements may be admissible to impeach a declarant who subsequently testifies at trial,
 5 but are not admissible as substantive evidence[.]”). A limiting instruction to the jury
 6 would be necessary. The Court will return to this fact in the discussion below.

7 **2. Rule 804.**

8 With respect to the Court’s Rule 804 analysis, the government argues the Court
 9 erred in finding the confession admissible because (1) Lee was available to testify,
 10 (2) Judge Martone already ruled the confession inadmissible in the trial of *United States*
 11 *v. Mecheryl Begay*, and (3) the confession was unreliable. The Court does not agree.

12 The government argues that Lee attempted to testify during the non-murder trial of
 13 Mecheryl Begay, but “was simply unsure of where or when to report[.]” Doc. 95 at 9.
 14 Thus, the government claims, “the record suggests that Lee was available to testify” and
 15 would also be available in this case. *Id.* But the document cited by the government
 16 shows only that Lee was served in Greasewood, Arizona with a subpoena for the
 17 Mecheryl Begay trial (on the third or fourth attempt), failed to call the attorney identified
 18 on the subpoena as directed by the serving officer, hitchhiked to Phoenix with his uncle
 19 for a medical appointment on a date he could not recall, and did not bring the subpoena
 20 with him. *See* CT-06-0453-PHX-FJM. This hardly shows that Lee made an earnest
 21 effort to comply with the subpoena or would have appeared at the trial in this case. More
 22 importantly, the government presents no reason to conclude that Lee knew he would be
 23 questioned in the Mecheryl Begay trial about his alleged confession.

24 The Court continues to believe that a good possibility exists that Lee would not
 25 have appeared for trial in this case or would have invoked his Fifth Amendment rights if
 26 he knew he was going to be asked about his confession. This is particularly true in light
 27 of the fact that the Court probably would have been required to appoint counsel for him
 28 before he was asked if he murdered the victims in this case. Either his absence or his

1 invocation of his Fifth Amendment right to remain silent would render him unavailable
2 for purposes of Rule 804. *See United States v. Gadson*, 763 F.3d 1189, 1200 (9th Cir.
3 2014) (noting witness was deemed unavailable “due to his invocation of his Fifth
4 Amendment privilege against self-incrimination”). It is also quite possible that Lee
5 would have testified that he does not remember anything about the confession to
6 Dorasita, thereby rendering himself unavailable under Rule 804(a)(3). *See United States*
7 *v. Jonassen*, 759 F.3d 653, 661 (7th Cir. 2014) (witness unavailable because she testified
8 that she did not remember the subject matter).

9 In addition, the fact that Judge Martone suggested Lee’s confession would be
10 inadmissible does not control the Court’s ruling in this case. Judge Martone found Lee’s
11 confession to be a statement against penal interest. Doc. 86-4 at 36-38. When he asked
12 what corroborating evidence existed to support the statement, as required by Rule
13 804(b)(3)(B), the only evidence identified by defense counsel was that Lee said he had
14 used a .30-06 caliber rifle to shoot the victims. Judge Martone found this single piece of
15 evidence to be insufficient corroboration. *Id.* More corroboration was identified in this
16 Court’s ruling, including that the young woman victim was not the primary target, that
17 facts in Lee’s confession were consistent with his personal situation (a drug deal gone
18 bad, when Lee Jr. was involved in drug sales, and use of a weapon that Lee Jr.’s father
19 might well have obtained in connection with his illicit business), and that the confession
20 was made to a law enforcement officer, while Lee Jr. was in custody, and with no
21 apparent benefit to himself. Doc. 91 at 19-20. The Court continues to believe that these
22 additional facts likely would have provided the corroboration required by Rule
23 804(b)(3)(B).

24 The government now claims that new evidence undermines the entirety of the
25 confession. This new evidence is that the bullet found at the crime scene was actually a
26 7.62x39mm, not a .30-06 bullet. Doc. 95 at 10. Thus, the government asserts, Lee’s
27 confession to using a .30-06 rifle to shoot the victims is not reliable. But as the
28 government concedes, both the 7.62x39mm and the .30-06 are .30 caliber bullets and the

1 evidence is certainly not “new,” as the bullet found at the crime scene has been in the
 2 government’s possession for nearly ten years. Indeed, Special Agent Jones testified at
 3 trial that the bullets found at the scene were “7.62 millimeter by 39 shell casings, which
 4 are .30 caliber[.]” Case No. 06-626, Doc. 91 at 90. Regardless, given the similarity of
 5 the two types of bullets, the Court continues to find that Lee’s confession to Dorasita
 6 likely contained sufficient corroboration to be admissible under Rule 804(b). Lee’s
 7 alleged confession was made “under circumstances which provided considerable
 8 assurance of their reliability.” *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973).⁵

9 **3. Conclusion.**

10 “A defendant is prejudiced by counsel’s deficient performance if ‘there is a
 11 reasonable probability that, but for counsel’s unprofessional errors, the result of the
 12 proceeding would have been different.’” *Clark v. Arnold*, 769 F.3d 711, 725 (9th
 13 Cir. 2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). For Lee’s
 14 confession to have a “reasonable probability of affecting the outcome of the trial, there
 15 had to be a reasonable probability that a competent lawyer would have introduced
 16 evidence of [the confession] in an admissible form.” *Cannedy v. Adams*, 706 F.3d 1148,
 17 1163 (9th Cir. 2013).

18 The Court sees five possible outcomes if trial counsel had sought to present
 19 evidence of Lee’s confession at trial: (1) Lee would have failed to appear; (2) Lee would
 20 have appeared and invoked the Fifth Amendment; (3) Lee would have appeared and
 21 testified that he had no memory of confessing; (4) Lee would have appeared and denied
 22 confessing; or (5) Lee would have appeared and confirmed that he confessed. In
 23 scenarios (1), (2), and (3), which the Court considers most likely, Lee would have been
 24 unavailable and Dorasita’s testimony about the confession would have been admissible
 25 under Rule 804(b)(3). Under scenario (5), the facts of Lee’s confession would also be
 26 introduced to the jury. Under scenario (4), Lee’s confession could be admitted under

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 28 ⁵ To the extent that the government challenges other facts surrounding the
 credibility of the confession, these issues were raised in the government’s objections to
 the R&R and the Court addressed them in its previous order.

1 Rule 613, but only with a limiting instruction that it is not substantive evidence. Thus,
 2 under four of the five possible scenarios, the jury would have received substantive
 3 evidence of Lee's confession. The Court finds these odds sufficient to create a
 4 "reasonable probability that a competent lawyer would have introduced evidence of the
 5 [confession] in an admissible form." *Cannedy*, 706 F.3d at 1163; *see also United States*
 6 *v. Hall*, 165 F.3d 1095, 1113 (7th Cir. 1999) (noting that "states must allow defendants to
 7 put reliable third-party confessions before the jury, despite the hearsay rule, when
 8 necessary to assist in separating the guilty from the innocent"). The prejudice
 9 requirement is satisfied.

10 **C. Pawn Shop Evidence.**

11 The government asserts that trial counsel's failure to introduce the pawn shop
 12 evidence was a strategic decision for which attorneys are afforded "wide latitude" and
 13 that his "handling of that evidence constituted a tactical trial decision, not a negligent
 14 failure to investigate and present evidence." Doc. 95 at 12. It further asserts that even if
 15 the evidence was admitted, "the government would be able to show – through Loren
 16 Clark – that Begay was seen firing an SKS after the pawn but before the murder" and
 17 may have even confirmed that Begay did, in fact, know how to shoot an SKS rifle and
 18 had owned one in the past. *Id.* at 12-13.

19 This portion of the government's motion merely reasserts arguments presented in
 20 its objections to the R&R. Like the objections, much of the government's argument
 21 focuses on whether the Court viewed the evidence through the benefit of hindsight, as
 22 well as whether the Court should defer to trial counsel's explanation that his decision not
 23 to investigate and present the pawn shop evidence was "tactical." No new evidence is
 24 presented and the government identifies no manifest error in the Court's decision. Any
 25 analysis on this issue would be cumulative, and the Court declines to rethink its previous
 26 decision on this issue. *See Rezzonico*, 32 F. Supp. 2d 1112, 1116. Moreover, the Court
 27 would grant a new trial on the basis of trial counsel's failure to investigate Lee's
 28 confession even if the pawn shop evidence was not at issue.

IT IS ORDERED that Respondent's motion for reconsideration (Doc. 95) is denied.

Dated this 9th day of June, 2015.

David G. Campbell

David G. Campbell
United States District Judge